No. 85-2099

In The

Supreme Court of the United States

October Term, 1986

—o—

COMMONWEALTH OF PENNSYLVANIA,
Petitioner,

v.

DOROTHY FINLEY,
Respondent.

—o—

ON WRIT OF CERTIORARI TO THE SUPERIOR COURT OF PENNSYLVANIA

—o—

JOINT APPENDIX

—o—

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PETITION FOR CERTIORARI FILED JUNE 20, 1986
CERTIORARI GRANTED OCTOBER 6, 1986

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TABLE OF CONTENTS

COURT OF COMMON PLEAS OF PHILADELPHIA

TRIAL DIVISION—CRIMINAL SECTION

DOCKET ENTRIES

Edward J. Bradley
President Judge

COMMONWEALTH
VS.
DOROTHY FINLEY

1975 May

1128—Robbery
1129—Carrying Firearms on Public Streets of [sic] Public Property, Unlawfully Carrying Firearm without a License, Carrying Firearms without a license in a vehicle
1130—Possessing Instruments of Crime, Generally, Possessing Instruments of Crime, Concealed Weapon, Prohibited Offensive Weapons
1131—Criminal Conspiracy
1132—Murder, Voluntary Manslaughter, Involuntary Manslaughter

---

Sept. 12, 1975—Motion to Suppress Statements and Physical Evidence, begun

Sept. 19, 1975—Court Room 676
Motion to Suppress completed and held under advisement. Counsel to submit briefs. Prattis, J.

Oct. 14, 1975—Court Room 253
Presiding Honorable Armand Della Porta
Defendant present with her counsel

—Upon being arraigned, pleads Not Guilty
—Jury trial is waived

—Defense Demurs to the evidence
—Demurrer over-ruled

Oct. 17, 1975—Court Room 253
ADJUDGED:
1128—Guilty
1129—Guilty of Carrying Firearms without a license in a vehicle. Not Guilty as to 1st and 2nd counts.

Oct. 17, 1975—1130—Guilty first and third count.
Not Guilty second count.
1131—Guilty
1132—Guilty, Murder, 2nd degree
—Sentence deferred.
—Bail increased from five thousand dollars ($5,000.) to Ten thousand dollars ($10,000.) Defendant committed pending posting of additional $5,000.00 bail.
—Presentence investigation and psychiatric examination ordered. Della Porta, J.

Feb. 24, 1976—Court Room 436
Post Trial Motions are *denied.*
And Now Sentence:
1128—Not less than ten (10) years nor more than twenty (20) years in State Correctional Institution, to run concurrent with sentence imposed on Bill 1132.
Della Porta, J.

1129—Sentence Suspended.
Della Porta, J.

1130—Not less than one (1) year nor more than two (2) years at State Correctional Institution, to run consecutive to sentence on #1131 and concurrent with sentence on #1132. Della Porta, J.

1131—Not less than five (5) years nor more than ten (10) years at State Correctional Institution, to run consecutive to sentence on #1128 and concurrent with sentence on #1132. Della Porta, J.

1132—Life imprisonment at State Correctional Institution. Defendant to remain at House of Correction until state of defendant's husband is determined within thirty days. Della Porta, J.

Mar. 23, 1978—Judgment of sentence imposed on Feb. 24, 1976 is affirmed by the Supreme Court of Penna.

Sept. 21, 1978—Petition for Allowance of Compensation and Expenses, filed

Oct. 4, 1978—Order of Judge Rosenberg, allowing compensation to David Zwantez, Esq. in the amount of $3,400. and $173.80 for expenses.

April 9, 1979—Petition for Relief Under Post Conviction Hearing Act, filed

Sept. 28, 1979—Memorandum Opinion and Order of Judge Blake wherein defendant's Petition for Relief under the Post Conviction Hearing Act is *denied.*

Oct. 19, 1979—Notice of Appeal to Superior Court, filed (2160 Oct. 1979)

12-24-1981—Order of the Court below is vacated and the Matter is remanded to that court with instructions to determine whether appellant was indigent and if so to appoint counsel. Flaherty, J.

1-29-1982—Petition for reargument, denied.

4-15-1982—Record returned to the Lower Court.

June 22, 1982—Michael Seidman, Esq. appointed

Oct. 7, 1982—Order of Judge Blake filed wherein pursuant to the remand, an attorney was appointed for the petitioner. After full investigation, the appointed attorney has

concluded that there are no issues of arguable merit. Accordingly, the Petition for Relief under the Post Conviction Hearing Act, filed in the above captioned matter, is hereby dismissed without hearing. Blake, J.

Oct. 18, 1982—Notice of Appeal to Superior Court filed at #2978 Phila. 1982

Oct. 25, 1982—Order of Judge Blake relieving Michael Seidman and ordered the appointment of new counsel.

Oct. 26, 1982—Seidman, Esq. relieved. Catherine Harper, Esq. appointed.

THIS IS TO CERTIFY THAT THE ABOVE IS A TRUE AND CORRECT COPY OF THE DOCKET ENTRIES.

Feb. 22, 1983—Opinion filed. Blake, J.
/s/ Mary Heying

LIST OF DOCUMENTS IN FILE

1. Microfilmed Bills of Indictment #1128-1132 May 1975
2. Petition for Allowance of Compensation and Expenses
3. Order of Judge Rosenberg
4. Petition for Relief under Post Conviction Hearing Act
5. Memorandum Opinion and Order of Judge Blake
6. Notice of Appeal to Superior Court (2160 Oct. 1979)
7. Notes of Testimony:
   5-7-75, 9-18-75, 9-19-75, 10-14-75, 10-15-75, (10-16 & 17-75)

DISPOSITION

July 26, 1984—Superior Court of Pennsylvania remands for an evidentiary hearing on the claims raised in Appellant's brief and any other issues discerned by counsel after an exhaustive search of the record in accordance with the Opinion of Judge Popovich. Jurisdiction Relinquished.

June 13, 1986—Supreme Court appeal dismissed as improvidently granted.

June 20, 1986—Record to Ray Porreca, Esq. P.C.H.A. legal counsel.

[J-332-81]

IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

COMMONWEALTH OF PENNSYLVANIA	No. 80-3-547
v.	Appeal from the P.C.H.A. Order of the Philadelphia Court of Common Pleas, Trial Division, Blake, J., as of May Term, 1975, Nos. 1128, 1129, 1130, 1131, and 1132, entered September 28, 1979 denying Defendant's Petition for Relief under the Post Conviction Hearing Act.
DOROTHY FINLEY, Appellant	

SUBMITTED:
OCTOBER 19, 1981

OPINION OF THE COURT

MR. JUSTICE FLAHERTY 12-24-81

Appellant Dorothy Finley was convicted of possessing an instrument of crime generally, prohibited offensive weapon, carrying a firearm without a license, criminal conspiracy, robbery and murder of the second degree. On direct appeal, two issues were raised: (1) the evidence was insufficient to sustain the convictions and (2) evidence obtained pursuant to a search warrant was inadmissible because the search warrant was based on illegally obtained evidence. In a *per curiam* opinion, this

Court affirmed the judgments of sentence. *Commonwealth v. Finley,* 477 Pa. 211, 383 A.2d 898 (1978). Appellant subsequently filed a *pro se* petition pursuant to the Post Conviction Hearing Act, Act of January 25, 1966, P.L. 1580 (1965), 19 P.S. § 1180-1 et seq. (Supp. 1981-82), where she raised the identical issues addressed by this Court on direct appeal. Although appellant alleged she was indigent and requested appointment of counsel, the PCHA court denied her petition without a hearing, holding the issues raised in the petition had been finally litigated. 19 P.S. § 1180-4. On appeal from the denial of her petition appellant requests the case be remanded to the lower court for appointment of counsel to assist in the preparation and filing of an amended petition under the Act.

An indigent petitioner has the right to the assistance of counsel with his first PCHA petition. *Commonwealth v. McClinton,* 488 Pa. 598, 413 A.2d 386 (1980). The Commonwealth urges us to deny appellant relief, arguing this case falls within an exception to the right to counsel provided in Pa.R.Crim.P. 1504. Pa.R.Crim.P. 1503(a) requires the court to appoint counsel once petitioner satisfies the court of his financial inability to obtain counsel.[1] The only exception to this rule as provided in Pa.R.Crim.P. 1504 is as follows:

---

[1]Although Section 12 of the Act, 19 P.S. § 1180-12, provides appointment of counsel is not required where the petitioner's claim is "patently frivolous and without trace of support in the record. . .", this provision has been suspended in part and superseded insofar as it is inconsistent with Pa.R.Crim.P. 1503(a) and 1504. Pa.R.Crim.P. 1507; *Commonwealth v. Blair,* 470 Pa. 598, 369 A.2d 1153 (1977).

> Appointment of counsel shall not be necessary and petitions may be disposed of summarily when a previous *petition* involving the same issue or issues has been finally determined adversely to the petitioner and he either was afforded the opportunity to have counsel appointed or was represented by counsel in proceedings thereon.

(Emphasis supplied). Our prior case law has consistently adopted a strict construction of the language of the Rule. *Commonwealth v. Blair*, 470 Pa. 598, 369 A.2d 1153 (1977); *Cf. Commonwealth v. Sangricco*, 490 Pa. 126, 415 A.2d 65 (1980). Rule 1504 provides an exception to the general right to appointment of counsel only where a previous *PCHA petition* involving the same issues has been determined adversely to the petitioner in a *proceeding on the PCHA petition* and the petitioner either knowingly waived his right to representation by counsel or was actually represented by counsel in that proceeding. Since Rule 1504 applies to proceedings on prior PCHA petitions, it is not dispositive of appellant's claim instantly.

Counsel for a PCHA petitioner can more ably explore legal grounds for complaint, investigate underlying facts, articulate claims for relief and promote efficient administration of justice.

Accordingly, the order of the court below is vacated and the matter is remanded to that court with instructions to determine whether appellant was indigent and if so to appoint counsel. If it is determined that appellant is entitled to the appointment of counsel, she may, upon request, amend her petition.

It is so ordered.

MICHAEL A. SEIDMAN
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Attorney at Law

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PHILADELPHIA, PA. 19103
(215) 546-8350

October 5, 1982

Honorable Edward J. Blake
658 City Hall
Philadelphia, PA 19107

Re: Commonwealth v. Dorothy Finley
May Term, 1975
No. 1128-1132

Dear Judge Blake:

I have reviewed the Notes of Testimony in the above matter and I have met with the defendant to discuss her Post Conviction Hearing Act Petition. I cannot find any issues to raise on her behalf that are of arguable merit. In addition, my client, Mrs. Finley, did not find any issues that she wished to raise other than the issues raised in her pro se petition. One of these issues deals with the sufficiency of the evidence. The Commonwealth's evidence consisted primarily of eyewitness testimony. The sufficiency of that testimony was a matter of credibility which was decided against the defendant by the waiver Judge. The other issue involved the search warrant which was finally litigated on direct appeal to our Supreme Court. See 383 A.2d 898 (1978). Consequently, I respectfully request to be relieved of my appointment in this matter.

Very truly yours,

/s/ Michael A. Seidman

MAS:jl
cc: Dorothy Finley

IN THE COURT OF COMMON PLEAS
OF PHILADELPHIA COUNTY

TRIAL DIVISION—CRIMINAL SECTION

COMMONWEALTH OF PENNSYLVANIA	MAY TERM, 1975
vs.	
DOROTHY FINLEY	NOS. 1128-1132

OPINION AND ORDER

BLAKE, J. FILED: February 22, 1983

This matter is before the Court on Defendant's Petition for Relief under the Post Conviction Hearing Act. 42 Pa.C.S.A. 9541 et seq. Following careful review of the entire record and of the applicable law, we are convinced that this Petition must be dismissed after the appointment of counsel and without a hearing.

Defendant was arrested on April 18, 1975 and charged with robbery, carrying firearms on a public street, unlawfully carrying a firearm without a license, carrying firearms without a license in a vehicle, possessing the instruments of crime generally, possessing a concealed weapon, possessing a prohibited offensive weapon, criminal conspiracy, murder, voluntary and involuntary manslaughter. On October 14, 1975 the Defendant waived her right to trial by jury, immediately proceeded to trial before the Honorable Armand Della Porta and was found guilty of robbery, carrying firearms without a license in a vehicle, possessing the instruments of crime generally, possessing a prohibited offensive weapon, criminal conspiracy, and second degree murder. Timely post-trial motions were heard and denied on February 26, 1976, and the Defendant

was sentenced to concurrent terms of not less than ten (10) nor more than twenty (20) years imprisonment on Bill No. 1128, not less than one (1) nor more than two (2) years imprisonment on Bill 1130, not less than five (5) nor more than ten (10) years imprisonment on Bill No. 1131 and a term of life imprisonment on Bill No. 1132. Sentence was suspended on Bill No. 1129.

Defendant pursued an unsuccessful direct appeal to the Supreme Court of Pennsylvania which, on March 23, 1978, affirmed the judgment of sentence, per curiam. *Commonwealth vs. Finley*, 477 Pa. 211, 383 A.2d 898 (1978).

On April 9, 1979, the Defendant filed, pro se, the instant PCHA Petition for Relief. However, in an Opinion and Order dated September 28, 1979, this Court denied Defendant's Petition without the appointment of counsel and without a hearing, on the ground that the two (2) issues forwarded in the pro se Petition were identical to those raised and denied on direct appeal before the Supreme Court of Pennsylvania, and had therefore been finally litigated under 19 P.S. 1180-4 [now 42 Pa.C.S.A. 9544(A)] of the former PCHA statute.

Defendant pursued a counseled appeal from the denial of PCHA relief to the Superior Court of Pennsylvania which, on May 8, 1980, transferred the appeal to our Supreme Court. On December 24, 1981 our Supreme Court vacated the September 28, 1979 Order of this Court and remanded with " . . . instructions to determine whether appellant was indigent and if so to appoint counsel. If it is determined that appellant is entitled to the appointment of counsel, she may, upon request, amend her petition." *Commonwealth vs. Finley*, 497 Pa. 332, 335,

440 A.2d 1183, 1184-85 (1981). A Commonwealth Petition for Reargument was denied on January 29, 1982.

Consequently, this Court complied with the Supreme Court directive and appointed counsel, Michael A. Seidman, Esquire. Mr. Seidman reviewed the Quarter Sessions file, the notes of testimony, issues of fact and law which Defendant herself had raised, independently reviewed the file and notes for the existence of any additional issues of fact or law which could arguably entitle Defendant to post-conviction relief, and met with Defendant Finley. Upon concluding that absolutely no issues of arguable merit could be found, Mr. Seidman looked to this Court for guidance regarding his duties in this situation.

It had previously been clear that the two issues that Defendant presented in her pro se Petition had been finally litigated to her detriment on direct appeal and, therefore, could not be resurrected in a post-conviction proceeding. 42 Pa.C.S.A. 9544(A)(3).

It is axiomatic that in post-conviction proceedings, counsel cannot be found incompetent or ineffective for failing to raise meritless claims. *Commonwealth vs. Johnson*, 490 Pa. 312, 416 A.2d 485 (1980); *Commonwealth vs. Hubbard*, 472 Pa. 259, 372 A.2d 687 (1977). Counsel's responsible refusal to forward meritless claims preserves the just policy of hearing cases and controversies expeditiously.

A PCHA Court may not only dismiss without a hearing contentions finally litigated [42 Pa.C.S.A. 9544(a)], or waived [42 Pa.C.S.A. 9544(B)], but may also deny and dismiss without a hearing contentions which are " 'patently frivolous' and [are] without a trace of support either in the record or from other evidence submitted by the Petitioner." [42 Pa.C.S.A. 9549(B)]. Therefore, it is clear that no PCHA Petitioner, first-time or otherwise, may assert an absolute entitlement to an evidentiary hearing. *Commonwealth vs. Hayden*, 224 Pa. Super. 354, 356, 307 A.2d 389, 390 (1973).

Instantly, the facts are as follows. Following the above-mentioned remand by our Supreme Court, court-appointed counsel Seidman reviewed the notes of testimony, Quarter Sessions file, issues of fact and law forwarded by Defendant herself, spoke with Defendant, conducted his own review for contentions which only a trained legal mind would discover, and concluded that no arguably meritorious issues existed. He then sought advice from this Court.

Counsel was instructed that he must take his client as he finds her; that the mere fact of having been appointed to represent a pro se Petitioner could not guarantee the existence of arguable contentions which might entitle the Defendant to post-conviction relief; that acceptance of the responsibility of a court-appointment in no way requires that he "find" an issue (e.g., manufacture an issue or present an issue not arguably meritorious); and that he must proceed as a responsible advocate and exercise his best professional judgment.

Counsel was instructed that where he had completed a comprehensive review of the entire record and the applicable law, and had interviewed Defendant and concluded that the record was devoid of arguably meritorious contentions, counsel should write this Court in letter form detailing not only the nature and extent of his review,

but also listing each issue Defendant herself wished to have raised, followed by an explanation why those issues were meritless. At that point, this Court would conduct its own independent review and, if our conclusions coincided with counsel's, the Petition would be dismissed without a hearing and Defendant would be apprised of her appellate rights.

Here, this procedure was followed and the Petition was dismissed without a hearing. Counsel was relieved with new counsel appointed to prosecute the instant appeal.

In *Commonwealth vs. Lowenberg,* 493 Pa. 232, 425 A.2d 1100 (1981), our equally-divided Supreme Court addressed the issue of the responsibility of court-appointed PCHA counsel upon counsel's determination that no arguably meritorious issues existed. Although the Court's numerous Opinions in *Lowenberg's* case are without binding precedential value, we find persuasive the statement of Mr. Justice Nix that the landmark case of *Anders vs. California,* 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed. 2nd 493 (1976), which outlines to court-appointed counsel the manner in which counsel must proceed as an active advocate, rather than as mere amicus curiae, properly applies to first direct appeals, and implicitly not to collateral attacks such as post-conviction proceedings. 493 Pa. at 239, 425 A.2d at 1101. We also find persuasive the statement of Mr. Justice Flaherty that "the Post Conviction Hearing Act was not intended to eliminate the finality of criminal convictions by allowing defendants to invoke an endless series of collateral proceedings." 493 Pa. at 236, 425 A.2d at 1102.

Furthermore, in the precedent case of *Commonwealth vs. McClendon,* 495 Pa. 467, 434 A.2d 1185 (1981), our

Supreme Court addressed the issue of what an attorney representing an indigent on direct appeal must do, when the attorney concludes that no arguably meritorious issues exist and then requests permission to withdraw as counsel. The Court was logically and constitutionally compelled to define the roles of the appellate court and of counsel consistent with the holding of *Anders vs. California,* supra.

The *McClendon* Court recognized the distinction between issues arguably meritorious yet unlikely to succeed, and issues totally lacking in arguable merit. 495 Pa. at 472-473, 434 A.2d at 1187. The Court concluded that " . . . *Anders* does not require that counsel be forced to pursue a wholly frivolous appeal just because his client is indigent" and that "once we are satisfied with the accuracy of counsel's assessment of the appeal as being wholly frivolous, counsel has finally discharged his responsibility." 495 Pa. at 473, 343 A.2d at 1188.

We agree with the Court's further conclusion that "[T]he role of an advocate, insisted upon in *Anders,* refers to the manner in which the record was examined in an effort to uncover grounds to support the appeal." 495 Pa. at 473, 343 A.2d at 1188.

With *McClendon,* supra, in mind, this Court addressed the issue of what appointed counsel representing an indigent must do in a *collateral* proceeding, where a comprehensive review of the entire record and applicable law, and an interview with Defendant, results in the determination that the PCHA Petition for Relief is devoid of issues of arguable merit. Under the PCHA Statute, this would occur where counsel finds nothing suggesting a conviction attained, or a sentence imposed, without due process of

law (42 Pa.C.S.A. 9542); where neither the Defendant nor the record forwards any contention which, if proven, would establish eligibility for relief (42 Pa.C.S.A. 9543); where all issues have been either finally litigated [42 Pa.C.S.A. 9544(A)]; or waived [42 Pa.C.S.A. 9544(B)]; or where contentions were patently frivolous or fully litigated following an evidentiary hearing at the original trial or at any later proceeding [42 Pa.C.S.A. 9549(B)].

Therefore, following receipt of counsel's letter concluding that arguably meritorious issues were non-existent and listing Defendant's contentions followed by a statement explaining their meritlessness, this Court conducted its independent review, concurred in counsel's conclusions, and dismissed this Petition without a hearing.

We believe that the aforementioned procedure is wholly consistent with safeguarding the rights of Defendant, the purpose and integrity of post-conviction law and proceedings, and the integrity and professionalism of court-appointed counsel. Furthermore, in so writing this Court following the unsuccessful search for arguably meritorious issues, counsel cannot be criticized for proceeding as mere amicus curiae where, until the end of his investigation, counsel vigorously researched the entire record and applicable law as an advocate in Defendant's behalf. To hold otherwise is to compel the presentation of frivolous issues, the forwarding of which distorts the nature and ends of law, debases the legal profession, disregards the integrity of the judicial process, and alienates our citizenry, all without benefiting the immediate object of our attention - - the indigent Defendant seeking post-conviction relief.

Therefore, since it is clear that the instant Petition forwards no grounds upon which post-conviction relief can be granted, it is hereby dismissed after the appointment of counsel and without a hearing.

Accordingly, and in light of the foregoing, we enter the following

O R D E R

AND NOW, TO WIT, this 7th day of October, 1982, Defendant's Petition for Relief under the Post Conviction Hearing Act is hereby denied after the appointment of counsel and without a hearing.

BY THE COURT:

/s/ Blake, J.

J. 17005/84

COMMONWEALTH OF PENNSYLVANIA
v.
DOROTHY FINLEY,
Appellant

IN THE SUPERIOR COURT OF PENNSYLVANIA

No. 02978
Philadelphia 1982

J U D G M E N T

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the above captioned matter, of the Court of Common Pleas of PHILADELPHIA County be, and is REMANDED WITH DIRECTIVES.

By the Court:

/s/ J. Haniel Henry
Prothonotary

Dated: June 22, 1984

J. 17005/84

COMMONWEALTH OF PENNSYLVANIA
v.
DOROTHY FINLEY,
Appellant

IN THE SUPERIOR COURT OF PENNSYLVANIA

No. 02978
Philadelphia 1982

Appeal from the Order of the Court of Common Pleas, Criminal Division, of Philadelphia County at No. 1128-1132 May Term, 1975.

BEFORE: ROWLEY, POPOVICH AND CERCONE, JJ.

OPINION BY POPOVICH, J.: FILED JUNE 22, 1984

This is an appeal from an order of the Court of Common Pleas of Philadelphia denying the Petition for Relief

under the Post-Conviction Hearing Act (PCHA), 42 Pa. C.S.A. 9541 *et seq.*, of appellant, Dorothy Finley. On October 17, 1975, after a non-jury trial, appellant was convicted of murder in the second degree, robbery, carrying firearms without a license, possessing instruments of crime, prohibited offensive weapon and criminal conspiracy. Since the convictions involved a homicide, direct appeal was taken to the Pennsylvania Supreme Court, where all the judgments of sentence were affirmed by Per Curiam Opinion at *Commonwealth v. Finley*, 477 Pa. 211, 383 A.2d 898 (1978). On appeal to the Supreme Court, appellant raised two issues: (1) whether there was sufficient evidence to support the verdicts and (2) whether the search warrant was based on illegally obtained evidence rendering the evidence obtained pursuant thereto inadmissible. The Supreme Court "found no merit in either of these arguments." *Commonwealth v. Finley, supra*, p. 898.

On April 9, 1979, appellant filed a *pro se* PCHA petition which merely repeated the allegations raised in direct appeal to the Pennsylvania Supreme Court. This PCHA petition was denied without a hearing and without appointment of counsel because "[i]n the instant petition the petitioner again raises the precise issues previously raised on appeal. . . ." Opinion, Blake, J., at 2. Subsequently, an appeal of the decision of the PCHA court was taken to the Pennsylvania Supreme Court which vacated the lower court order and remanded the case to the lower court with instructions that counsel be appointed for appellant if she were found to be indigent. In compliance with that Order, Michael A. Seidman, Esquire, of Philadelphia, was appointed counsel for appellant. Mr. Seid-

man concluded that no arguably meritorious issues existed for appellant in her PCHA petition, whereupon he was instructed by the lower court to adopt the following procedure:

> Counsel was instructed that where he had completed a comprehensive review of the entire record and the applicable law, and had interviewed defendant and concluded that the record was devoid of arguably meritorious contentions, counsel should write this court in letter form detailing not only the nature and extent of his review, but also listing each issue Defendant wished to have raised, followed by an explanation why those issues were meritless. At that point, this Court would conduct its own independent review and, if our conclusions coincided with counsel's the Petition would be dismissed without a hearing and the Defendant would be apprised of her appellate rights. Opinion Blake, J. at 5.

Counsel adhered to those guidelines and wrote the following letter to the court:

> I have reviewed the Notes of Testimony in the above matter and I have met with the defendant to discuss her Post Conviction Hearing Act Petition. I cannot find any issues to raise on her behalf that are of arguable merit. In addition, my client, Mrs. Finley, did not find any issues that she wished to raise other than the issues raised in her pro se petition. One of these issues deals with the sufficiency of the evidence. The Commonwealth's evidence consisted primarily of eyewitness testimony. The sufficiency of that testimony was a matter of credibility which was decided against the defendant by the waiver Judge. The other issue involved the search warrant which was finally litigated on direct appeal to our Supreme Court. See 383 A.2d 898 (1978). Consequently, I respectfully request to be relieved of my appointment in this matter.

Mr. Seidman was thereafter relieved, and the Petition was dismissed. New counsel was appointed to represent appellant in the instant appeal from that order.

In this appeal, appellant claims that she was denied effective assistance of counsel where the PCHA court-appointed counsel, Mr. Seidman, failed to file an amended PCHA petition and brief on behalf of his client and chose instead to outline for the court reasons why a PCHA petition would be meritless. We hold that the procedure followed below resulted in ineffectiveness of counsel. Accordingly, we vacate the order below and remand for present counsel to represent appellant in the filing of an amended PCHA petition.

Pennsylvania law concerning procedures to be followed when a court-appointed attorney sees no basis for an appeal is derived from the seminal case of *Anders v. California*, 386 U.S. 738, 87 S.Ct. 1396 (1967) rehrg. denied at 388 U.S. 924, 87 S.Ct. 2094. The Court in *Anders* applied a three-pronged formula, which, if scrupulously applied, will allow court-appointed counsel to withdraw from a case. If the attorney, after a conscientious evaluation of the record, finds his case to be "wholly frivolous", he may so advise the court and request permission to withdraw. He must, however, accompany his request with a brief referring to anything in the record which will "arguably" support an appeal. A copy of that brief should then be furnished to the indigent within enough time to allow the latter to pursue an appeal, either counselled or *pro se*. The *court*, after a full examination of the record, then decides whether the case is wholly frivolous; and, if it so finds, it may grant counsel's request to withdraw.

The procedure outlined above allows for the situation where counsel believes an appeal would be wholly frivolous but concurrently provides safeguards for the right of an indigent to enjoy the same zealous representation available to defendants able to afford private counsel.

Anders was adopted in Pennsylvania in *Commonwealth v. Baker*, 429 Pa. 209, 239 A.2d 201 (1968), wherein *Anders* was read as offering two choices to the court-appointed advocate: (1) he may file briefs and argue the case on behalf of his client as an advocate; or (2) he may choose to withdraw his services, in which case he must adhere to the *Anders* procedure.

Baker involved an appeal to the Supreme Court after relief was denied by our court. The instant case, however, arises from appellant's initial PCHA petition. The threshold inquiry must be, therefore, whether *Anders* applies; if we answer affirmatively, only then may we evaluate whether its requirements are met.

Commonwealth v. Lohr, — Pa. —, 468 A.2d 1375 (1983) arose as a result of appellant's filing a second PCHA petition after the time for appeal from the Superior Court's denial of relief from his first PCHA petition had passed. The Superior Court had affirmed the dismissal, without hearing, of appellant's second PCHA petition, and the appellant proceeded *pro se* to the Supreme Court armed, *inter alia*, with a fresh claim of ineffectiveness, which the Court chose to address. Appellant contended that appointed PCHA counsel was ineffective in failing to amend appellant's first *pro se* post-conviction petition and in failing adequately to pursue, as ordered, an appeal to the Supreme Court. The majority

prescribed application of *Commonwealth v. McClendon*, 495 Pa. 467, 434 A.2d 1185 (1981) in a case where counsel believes appeal is frivolous.

McClendon was a direct appeal where the court held that the requirements of *Anders* must be met. The Court felt obliged to determine whether the lower court was correct in its assessment of complete frivolity. It was only after it made that determination that the Court inquired as to whether the brief submitted complied with *Anders*. Under the circumstances, it found that compliance was unnecessary.[1] In affirming, the Court says

> "[t]he major thrust of *Anders* was to assure a careful assessment of any available claims that an indigent might have. That end is achieved by requiring counsel to conduct an exhaustive examination of the record and by also placing the responsibility on the reviewing court to make an independent determination of the merit of the appeal. . . . Once we are satisfied with the accuracy of counsel's assessment of the appeal as being wholly frivolous, counsel has fully discharged his responsibility." at 1188.

Although the Court in *Lohr* held that counsel's actions were outside the requirements of *McClendon*, in which the court echoes *Anders*, it, nevertheless, affirmed, stating that

> " . . . the goal pursued by *McClendon, review of the merit of the appeal,* is fulfilled by the instant review, negating the possibility of prejudice inuring to appellant from the omissions of counsel. Furthermore, notwithstanding counsel's dereliction, any relief this Court might extend to appellant would be merely duplicitous [sic] of the instant review and, thus, con-

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1 See page [25], *infra*.

sistent with principles of judicial economy, we decline the opportunity to remand for proceedings consistent with *McClendon.*" (Emphasis added) at 1379.

Anders has been applied in similar circumstances, and, therefore, we hold that its application to the instant case is proper. Counsel's brief does not satisfy the requirements of *Anders* in that it does not set forth any issues of arguable merit, nor is there evidence that it was provided to appellant within enough time for her to proceed *pro se* or to obtain new counsel. Notwithstanding these deficiencies, *McClendon* and *Lohr* offer us the opportunity to review the merits of the appeal. We decline, however, to follow the procedures utilized in *McClendon* and *Lohr.* We take a position which distinguishes this case from *Lohr,* based in part on the rationale behind the Supreme Court's remand for appointment of counsel.

The Supreme Court remanded, not because it saw any particular merit to the two contentions at issue, which were identical to those disposed of earlier in appellant's direct appeal. The Court stated, in remanding appellant's first PCHA appeal, "[c]ounsel for a PCHA petitioner can more ably explore legal grounds for complaint, investigate underlying facts, articulate claims for relief and promote efficient administration of justice." *Commonwealth v. Finley,* 497 Pa. 332, 440 A.2d 1183, 1184 (1981). The Supreme Court wished to afford appellant the opportunity to amass other issues with arguable merit. It is obvious that the issues listed by appellant in her *pro se* petition were meritless as they had previously been so described by the Pennsylvania Supreme Court. Moreover, Pa.R.Crim.P. 1504, in affording counsel, means that counsel should act as an advocate in fulfilling his role.

> " . . . it is not enough simply for the PCHA court to appoint counsel. For this settled rule 'also envisions that counsel so appointed shall have the opportunity and in fact discharge the responsibilities required by representation.' " *Commonwealth v. Lowenberg,* 493 Pa. 231, 425 A.2d 1100 (1981) quoting from *Commonwealth v. Fiero,* 462 Pa. 409, 413, 341 A.2d 448, 450 (1975).

Fiero involved an appellant-authored PCHA petition filed after counsel was appointed and prior to which there had been no direct appeal taken. Since counsel had neither amended the petition nor filed a brief, the court held that "[t]hese facts compel the conclusion that the proceeding was in fact uncounselled." *Id.* at 450. The court required "*meaningful* participation by counsel."

If we were to hold that the requirements of *Anders* were not met but concomitantly review the merits of the appeal and possible affirm as in *McClendon,* we would run into a further obstacle. The affirmance which was the outcome of *McClendon* was based on the "accuracy of counsel's assessment of the appeal", including "an exhaustive examination of the record", *Commonwealth v. McClendon, supra,* at 1188.

Here, there is no mention of an exhaustive search nor the required finding that the case is wholly frivolous.[2]

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[2] Progeny of *Anders* have provided us with a continuum of degrees of "meritless". Counsel's request to withdraw may only be granted if the court finds the case to be "wholly frivolous"; it may not be entertained if the appeal merely has "arguable merit" nor if it lacks merit. Mere absence of merit is not enough to support a request to withdraw or the granting of it. *Commonwealth v. Greer,* 455 Pa. 106, 314 A.2d 513 (1974); *Commonwealth v. Worthy,* 301 Pa. Super. 46, 446 A.2d 1327 (1982).

Counsel must certify to an exhaustive reading and endeavor to uncover all possible issues for review so that the frivolity of the appeal may be determined by the lower court, or, as in *Lohr*, at the appellate level.[3]

In the instant case, notwithstanding the fact that the *pro se* petition raised identical issues to those raised on direct appeal, we have a mandate from the Supreme Court with express instructions to appoint counsel and allow appellant to " . . . upon request, amend her petition." This remand carries with it a strengthening obligation to assess the quality of appellant's case in an arena wherein she is accompanied by a zealous advocate.

In accordance with the spirit of *Lohr* and *McClendon* and the manner in which they were disposed of on appeal, it should be noted that *McClendon* reduces the *Anders* requirements to a practical level.

> "If . . . 'wholly frivolous' means that there are no points present that 'might arguably support an appeal' counsel is saddled with an impossible burden, if he is nevertheless required to file a brief containing arguments that are non-existent. If on the other hand, there are claims of arguable merit, even though counsel may not have any confidence in them, . . . the appeal is not 'wholly frivolous' and counsel is not entitled to seek leave to withdraw." *Id.* at 1188.

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[3] It should be noted, in view of the fact that the *Lohr* Court chose to review the case on the merits, that *Lohr* involved a second PCHA petition, whereas this case involved the dismissal of the first post-conviction petition. The Court was concerned with considerations of judicial economy. Additionally, the attorney in *Lohr* apparently submitted a short petition to appellant which he rejected in favor of his own. The issues which he presented are evaluated by the Court.

Here, without anything more than "the bare record available in the Superior Court" (Appellant's Brief at 19), appellant's present counsel has been able to list several issues which may have arguable merit. It is certainly conceivable that those same issues would have captured the attention of prior counsel upon an "exhaustive" reading of the record. (Indeed, it should be noted that Mr. Seidman only admits to having read the Notes of Testimony).[4] Here, the "no-merit letter" is insufficient in light of the fact that there appear to be arguably meritorious issues, and the sufficiency of counsel's perusal of the record is not reflected.

It is also possible that appellant was never informed of her right to proceed *pro se* as she contends she was never given a copy of the letter written by counsel. The court in *Commonwealth v. Baker*, *supra*, states that the third requirement of *Anders* is the most important. "Anders clearly commands . . . that the client be given a copy of counsel's brief *in time to present the appeal in propria persona.*" *Id.* at 203.

Since the procedures utilized herein were defective, they acted to deprive appellant of her right to adequate representation. We remand for an evidentiary hearing on the claims raised in appellant's brief and any other issues discerned by counsel after an exhaustive search of the record in accordance with this opinion. Jurisdiction is relinquished.

ROWLEY, J. notes his dissent.

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[4] Moreover, counsel states in his letter that the sufficiency issue was a matter of credibility for the Judge and that the other issue was finally disposed of by the Supreme Court when, in fact, both issues were before that Court.

SUPREME COURT OF PENNSYLVANIA

Eastern District

COMMONWEALTH OF PENNSYLVANIA,

Appellant

v.

DOROTHY FINLEY,

Appellee.

No. 14 E.D. Appeal Docket, 1985

JUDGMENT

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the appeal having been improvidently granted, the same is hereby dismissed.

BY THE COURT:

/s/ Marlene F. Lachman, Esq.
Prothonotary

Dated: April 23, 1986

J # 154-85

IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

COMMONWEALTH OF PENNSYLVANIA,

Appellant

v.

No. 14 E.D. Appeal Dkt. 1985

Commonwealth's Appeal by Permission from the June 22, 1984 Decision of the Superior Court at No. 2978, Philadelphia, 1982, Remanding for an Evidentiary Hearing under the Post-Conviction Hearing Act as of Nos. 1128-1132, May Session, 1975, Philadelphia Court of Common Pleas, Criminal Trial Division

330 Pa. Superior Ct. 313, 479 A.2d 568 (1984)

DOROTHY FINLEY,

Appellee

ARGUED: October 23, 1985

ORDER

PER CURIAM

FILED: APRIL 23, 1986

Appeal dismissed as having been improvidently granted.
